No. 87-788

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HMK CORPORATION,

Petitioner,

v.

JOHN C. WALSEY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether this Court should reconsider the unanimous decision of the District Court and the Court of Appeals that a local land use dispute involving a single development opportunity did not constitute a "pattern of racketeering activity" under 18 U.S.C. § 1964(c).

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	7
REASONS FOR DENYING THE WRIT	7
I. The Circuit Courts Are Uniformly Applying This Court's Interpretation Of "Pattern" Under RICO	7
II. Legislation Currently Pending In Congress Will Codify *Sedima's* "Continuity Plus Relationship" Test For A RICO "Pattern"	11
III. This Case Presents a Factual Setting Which Is Uncharacteristic of Most RICO Litigation and Is Unsuitable to Review the Concept of "Pattern" Contained in *Sedima*	12
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

	Page
CASES:	
Albery v. Reddig, 718 F.2d 245 (7th Cir. 1983)	14
Bank of America National Trust & Savings Association v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986)	9
Bartichcck v. Fidelity Union Bank/First National State, 832 F.2d 36 (3d Cir. 1987)	8
Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982)	14
Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc., No. 87-1520 (4th Cir. Oct. 16, 1987)	9
H. J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987)	10
HMK Corp. v. County of Chesterfield, No. 84-0170-R (E.D. Va. 1986)	4
HMK Corp. v. Walsey, 828 F.2d 1071 (4th Cir. 1987)	2,5,6,7, 9,13,14
HMK Corp. v. Walsey, 637 F.Supp. 710 (E.D. Va. 1986)	3,4
International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987)	9
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	9
Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987)	10
Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986)	8,9
Naked City, Inc. v. Aregood, 667 F.Supp 1246 (N.D. Ind. 1987)	13
Papai v. Cremosnik, 635 F.Supp. 1402 (N.D. Ill. 1986)	9
R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985)	9
Raskiewicz v. Town of New Boston, 754 F.2d 38 (1st Cir.), *cert. denied,* 474 U.S. 845 (1985)	13,14
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)	12
Roeder v. Alpha Industries, Inc., 814 F.2d 22 (1st Cir. 1987)	8

	Page
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).	3,7,8,11
Sun Savings & Loan Association v. Oberdorff, 825 F.2d 187 (9th Cir. 1987)	9
Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986)	10
Torwest DBC, Inc. v. Dick, 810 F.2d 925 (10th Cir. 1987)	9
Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263 (3d Cir. 1987)	13
United States v. Ianiello, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 3229 (1987)	8
United States Magnet & Alloy Corp. v. Yardley Borough, No. 86-2898 (E.D. Pa. Dec. 11, 1986)	13
Verges v. Babovich, No. 86-2382 (E.D. La. Nov. 28, 1986)	13
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	14
Village of Belle Terre v. Boraas, 416 U.S. 1, 12 (1974)	14
FEDERAL STATUTES AND RULES:	
18 U.S.C. § 1961	1
18 U.S.C. § 1961(5)	2
18 U.S.C. § 1964(c)	i
18 U.S.C. § 3575(e)	8
Sup.Ct.R. 17.1	12
Fed.R.Civ.P. 12(b)(6)	2
Fed.R.Civ.P. 56	2
LEGISLATIVE MATERIALS:	
133 Cong. Rec. 7406 (daily ed. Oct. 9, 1987) (H.R. 3240)	11
H.R. 3240, 100th Cong., 1st Sess. (1981)	11
MISCELLANEOUS:	
Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 19 (1985)	12
RICO Revisited: An Advance Seminar on the Latest Techniques in Civil Suits 172-73 (A. Mathews Ed., Prentice Hall Law & Business 1987)	12

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Respondents, John C. Walsey, Barry S. Blumberg, Sigma CJ Associates, Petula Associates, Ltd., Stanley R. Balderson, Jr., Richard L. Hedrick, Harold S. King and Jack S. Hodge, by counsel, respectfully pray that petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 17, 1987, be denied.

STATEMENT OF THE CASE

HMK Corporation ("HMK") filed this action pursuant to 18 U.S.C. § 1961, *et seq.* ("RICO") in the United States District Court for the Eastern District of Virginia against administrative officials of the County of Chesterfield, Virginia (a political subdivision of the Commonwealth of Virginia, "County"), officials of the Virginia Department of Highways and Transportation (an agency of the Commonwealth of Virginia responsible for

the design, construction and maintenance of public roads, "VDH&T"), and two land development companies and certain of the companies' officers (collectively referred to as the "Boulders Developers"). In its Complaint, HMK alleged that respondents engaged in a single "Scheme to Defraud" the County, the Commonwealth of Virginia and HMK arising out of a dispute over HMK's development plan for a unified area of property in the County (referred to as the "Jahnke-Chippenham Development Area" or "JCDA"). Specifically, HMK alleged that respondents, through the County's local rezoning process, conspired to grant the Boulders Developers certain development advantages which impeded HMK's development plans for its adjacent property in the JCDA. Although this action was the first RICO case brought by HMK relating to the rezoning of the JCDA, it was the thirteenth lawsuit pursued by HMK, or its predecessor corporations, against respondents in which HMK claimed a conspiracy to thwart the public rezoning process so as to interfere with HMK's development opportunity in the JCDA.[2]

In response to HMK's RICO Complaint, respondents filed motions to dismiss and/or motions for summary judgment pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. Respondents' motions raised numerous defenses to HMK's broadly-stated assertions of fraud and conspiracy, including the preclusive effect of HMK's prior lawsuits and the fact that the case involved a single land use dispute between competing developers which could not satisfy RICO's "pattern of racketeering activity" requirement. 18 U.S.C. § 1961(5). Respondents also filed witness affidavits detailing the facts surrounding the rezoning of the JCDA and numerous exhibits including judicial decisions and factual findings from HMK's previously unsuccessful litigation efforts which had concluded that the majority of the allegations in HMK's Complaint were without factual foundation.

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[2] The Court of Appeals apparently treated six of HMK's previous state lawsuits contesting the validity of the rezoning of the JCDA as a single lawsuit since the six suits were ultimately consolidated for trial before the Circuit Court of Chesterfield County. *HMK Corp v. Walsey*, 828 F.2d 1071, 1072 (4th Cir. 1987). The thirteen lawsuits are graphically summarized at Resp. App. 1a-3a.

Respondents' motions were argued before the District Court on May 6, 1986. Based on the voluminous factual record and the application of those facts to the legal principles governing civil RICO claims after *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the court granted summary judgment and dismissed the action, holding, in part, that: (1) HMK was precluded, under the doctrines of *res judicata* and collateral estoppel, from using RICO to relitigate claims and issues already decided against it in previous state and federal lawsuits, and (2) since the land use dispute between the parties over the JCDA constituted only "isolated behavior", under the principles articulated in *Sedima*, "the entire course of conduct between HMK and the defendants does not constitute a RICO pattern," *HMK Corp. v. Walsey*, 637 F.Supp, 710, 712 n.2 (E.D. Va. 1986).

Although HMK asserts in its petition that this case was decided by the District Court in a factual vacuum, the court made numerous factual findings based on the affidavits and exhibits submitted by the parties and applied these findings to HMK's RICO claim to reach its decision granting summary judgment. The trial court's recitation of the facts underlying HMK's RICO claim examines in detail the entire history of the rezoning of the JCDA and the prior lawsuits filed by HMK in which HMK contested each aspect of the JCDA rezoning by claiming a widespread conspiracy by respondents to interfere in the County's rezoning process. *Id.* at 711-14. The District Court noted that in the lawsuits filed by HMK in the Circuit Court of Chesterfield County, the state court, after trial and after "liberal and exhaustive pre-trial discovery," held that the JCDA rezoning decisions were reasonable in all respects and that "the evidence at trial failed to show any impropriety and partiality by the [County's governing body] in rendering its decision." *Id.* at 715. The District Court then found that accusations raised by HMK in its RICO Complaint relating to the rezoning of the JCDA, the acquisition of right-of-way for a public road through the JCDA and the development of a transportation system to serve the JCDA had been raised and decided in prior federal litigation filed by HMK. After its exhaustive review of the facts underlying HMK's RICO action, the District Court concluded that:

> . . . HMK only turned to RICO after failing to obtain favorable decisions in other forums and actions. Indeed, Congress intended civil RICO to be an extraordinary remedy in the fight against organized crime. It was never intended to be a sword of Damocles, held in abeyance until aggressive litigants, having failed in conventional actions, unsheathed the RICO sword in their arsenal for use in yet another lawsuit.

Id. at 724.

Finally, the trial court examined the facts underlying HMK's RICO claim in light of the "pattern of racketeering activity" requirement of RICO. The court first found that regardless of HMK'S conclusory allegations of a broad and continuing conspiracy among respondents, the case involved, at most, isolated behavior concerning a single land use controversy:

> Although the parties have filed voluminous briefs and exhibits detailing the history of this case, the Court finds the case extraordinarily simple. Two developers have crossed swords over a unified section of land so that the advantages given one hamper the aspirations of the other.

Id. at 711. Next, the court adopted the suggestion of this Court in *Sedima* that any meaningful concept of pattern must include the elements of "continuity plus relationship" and concluded that this isolated dispute between two developers battling over a single development opportunity in a unified area of the County could not satisfy the RICO pattern requirement. Accordingly, the court held that HMK's Complaint failed to state a cognizable claim for relief under RICO.[3]

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[3] The court also noted that despite HMK's complaints about mistreatment, the County had actually granted HMK a favorable level of rezoning (allowing densities dramatically higher than those granted the adjacent properties within the JCDA) and had approved an amendment to the County's general land use plan so as to accommodate HMK's proposed development and transportation access plan. *Id.* at 720. By order entered October 30, 1986 in *HMK Corp.* v. *County of Chesterfield*, No. 84-0170-R (E.D. Va 1986), the District Court specifically held that the rezoning of HMK's property was favorable to HMK. Resp. App. 4a.

On appeal, the Fourth Circuit Court of Appeals, affirming the District Court, held that "HMK's allegations in their entirety do not amount to a pattern of racketeering activity." *HMK Corp. v. Walsey,* 828 F.2d 1071, 1073 (4th Cir. 1987). In reaching its decision, the Court of Appeals engaged in a detailed analysis of the RICO pattern requirement after *Sedima.* In particular, the court examined how the concept of pattern in RICO should be applied to the unique factual context of a mixed commercial and political dispute such as the one presented by this case.

Consistent with the approach adopted by other appellate courts analyzing RICO's "pattern of racketeering activity" requirement, the Court of Appeals first addressed this Court's suggestion in *Sedima* that the lower courts "develop a meaningful concept of 'pattern' " in an effort to curb "[t]he 'extraordinary' uses to which civil RICO has been put." *Id.* Citing various appellate decisions examining how the pattern concept should be applied, the court recognized the need to place the pattern concept within the context of all of the circumstances presented in a given case, concentrating on the "nature of the underlying offenses" and the " 'criminal dimension and degree' of the alleged misconduct." *Id.* at 1073-74. The court then examined the facts of the present case and, consistent with the findings of the District Court, found that HMK's Complaint related "merely to the allocation of burdens and benefits in the development of two adjoining properties," and that notwithstanding HMK's attempt to inflate a single local land use dispute into a controversy of RICO proportions, "[n]othing in HMK's allegations sets this development dispute above any other dog-fight between developers." *Id.* at 1075.[4]

[4] In a transparent attempt to force this local land use dispute into the statutory "pattern" requirement of RICO, HMK has now attempted to transform the single "Scheme to Defraud" originally pled in its Complaint into "schemes", "six distinct episodes", "eleven governmental decisions" and "multi-episodic schemes". Pet. App. 4, 5, 8. HMK's new characterization of the nature of its case directly conflicts with the findings, supported by the record, of both the District Court and the Court of Appeals, that the case involves nothing more than a dispute between developers over a single development opportunity.

Finally, the Court of Appeals dissected the allegations constituting HMK's "Scheme to Defraud" in the context of the facts surrounding this local land use controversy. Noting that, under the legislative history of RICO, the statute was not designed to target the isolated offender or to apply to sporadic instances of criminal activity, the court analyzed the totality of the dispute to determine whether HMK's compilation of alleged predicate acts was indicative of wide-spread, pervasive criminal conduct or merely described a single isolated episode whose duration was a function of the manner in which land use decisions are customarily made at the local level. First, the court found that land use decisions necessarily "require the involvement of many governmental decisionmakers at various stages of the approval process" who are required to address "numerous, important, and often competing, interests and concerns." *Id.* at 1074-75. Second, the court noted that public zoning bodies "often proceed deliberately" and that the zoning approval process involves "multiple hearings and opportunity for public comment" which "serve to inform public officials, provide a forum for public opinion, and permit landowners adversely affected by the proposed changes to voice their opposition." *Id.* at 1075. Finally, while the court found that the complexity of local land use procedures "inevitably leads to a protraction of the administrative process," it concluded that such protraction "is a worthwhile price for the benefits of due process and accurate decisionmaking." *Id.*

With these factors in mind, and consistent with the findings of the District Court, the Court of Appeals concluded that HMK's Complaint, despite alleging improper actions by various officials over a period of time, in reality involved nothing more than a routine local zoning dispute between two developers over a single area of land. HMK's attempted elevation of this land use dispute into a RICO controversy by alleging scores of acts committed by public officials was a function of the complexity of the process itself, not a function of "pervasive involvement by a developer in the political process through widespread racketeering activity." *Id.*[5] Since this case involved a dispute

[5] Significantly, the court recognized that HMK had not alleged that respondents had ever interfered in the County's planning process before the JCDA rezoning dispute or had done so since. *Id.* Nor has HMK ever alleged that respondents engaged in any other "Scheme to Defraud" in other locations in the County or in conjunction with other developments.

between developers over a single development opportunity, the court concluded that "the element of 'continuity' necessary for a pattern of racketeering activity under RICO" was lacking and affirmed the District Court's decision granting the respondents' motion for summary judgment. *Id.* In reaching its decision, the Court of Appeals, consistent with the unanimous practice of federal trial and appellate courts since *Sedima,* specifically adopted the "continuity plus relationship" test for establishing a "pattern of racketeering activity" suggested by this Court in *Sedima.* Because this case involved only isolated activity with no threat of the continuing criminal activity RICO was designed to eliminate, the Court of Appeals properly affirmed the District Court's decision.

SUMMARY OF THE ARGUMENT

This Court should deny the petition for a writ of certiorari in the present case. The District Court and the Fourth Circuit appropriately applied the "pattern" concept contained in *Sedima* to properly dismiss a localized zoning dispute. The circuit courts are consistently following this Court's directive in *Sedima* and are formulating a meaningful definition of pattern using the concepts of continuity and relatedness. Certiorari is inappropriate when, as here, a consensus is continuing to develop among the circuits regarding the application of the pattern definition in *Sedima.* Moreover, there is legislation now pending which will codify the pattern test set forth in *Sedima.* The pendency of such legislation enhances the risk that a review of the pattern issue at the present time will be supplanted by subsequent legislative enactment. Finally, the present case serves as an undesirable vehicle to further consider RICO's pattern requirement because the case involves a uniquely mixed political and commercial land use dispute which could limit the applicability of any Supreme Court holding to the peculiar facts of this case.

REASONS FOR DENYING THE WRIT

I. The Circuit Courts Are Uniformly Applying This Court's Interpretation Of "Pattern" Under RICO.

In *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 n.14 (1985), this Court stated that the term "pattern" under RICO means something more than two acts of racketeering activity.

This Court noted that the legislative history of RICO supports the view that activity which is both isolated and sporadic does not constitute a pattern. This Court also directed lower courts, in deciding whether a pattern of racketeering activity exists, to focus on numerous factors, including whether the activity " 'embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " *Id. quoting* 18 U.S.C. § 3575(e). This Court concluded that in order to establish a RICO pattern, the plaintiff must demonstrate that the factor of "continuity plus relationship" combines to produce the pattern of racketeering activity underlying its RICO claim.

Since *Sedima,* the lower courts have uniformly applied the test of "continuity plus relationship" to determine whether a pattern has been pled.[6] Because acts of racketeering activity are typically related, most courts have focused on the "continuity" aspect of the *Sedima* test. Those "[c]ourts generally agree that to make an adequate showing of continuity under *Sedima,* a plaintiff must demonstrate some facts from which at least a threat of ongoing illegal conduct may be inferred." *Torwest DBC, Inc. v. Dick,* 810 F.2d 925, 928 (10th Cir. 1987).

A review of the circuit court decisions since *Sedima* reveals that the courts are analyzing the facts of each particular case to distinguish those cases involving only isolated or sporadic criminal activity from those raising a legitimate inference of continuing criminal conduct. For instance, the Seventh Circuit has adopted a factually-oriented standard which focuses on the ongoing nature of the predicate acts. *Morgan v. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986). The First, Second, Third, Ninth and Tenth Circuits follow a similar approach. *Roeder v. Alpha Industries, Inc.,* 814 F.2d 22 (1st Cir. 1987); *United States v. Ianiello,* 808 F.2d 184 (2d Cir. 1986), *cert. denied,* 107 S.Ct. 3229 (1987); *Barticheck v. Fidelity Union Bank/First National*

[6] Contrary to petitioner's suggestion that, since RICO's pattern requirement was not central to the *Sedima* decision, this Court has offered little insight into how that term should be interpreted, Pet. 10 n.5, the lower courts have unhesitatingly adopted *Sedima's* analysis to decide pattern questions.

State, 832 F.2d 36 (3d Cir. 1987); *Sun Savings & Loan Association v. Oberdorff*, 825 F.2d 187 (9th Cir. 1987); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987).[7] Consistent with this approach, the Fourth Circuit has "elaborated a case-by-case standard akin to that announced by the Seventh Circuit in *Morgan*." *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073 (4th Cir. 1987). The existence of a RICO pattern, observed the court, is "a matter of criminal dimension and degree" which cannot be determined by a "mechanical test." *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987).[8] The focal point for making that determination is "the threat of continuity of racketeering activity." *Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc.*, No. 87-1520 (4th Cir. October 16, 1987).

An analysis of the circuit court decisions which have addressed RICO's pattern requirement illustrates that the federal appellate courts are uniformly applying the "continuity plus relationship" test announced in *Sedima* and found in the legislative history of RICO.[9] Guided by *Sedima*, the circuit courts are examining the facts of each RICO case and are determining whether those facts fit within *Sedima's* directive that the acts of racketeering activity be continuous and related.

Some of the courts have articulated *Sedima's* pattern requirement using different terms, but not in such a manner as to create the type of "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" that warrants a grant of certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). For instance, the Fifth and Eleventh Circuits have found a pattern upon a showing of two or more separate but related predicate acts. *R.A.G.S.*

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[7] The District of Columbia and Sixth Circuits have not yet addressed the pattern issue.

[8] As the Seventh Circuit noted in *Morgan*, a factually-oriented standard is perhaps the fairest and most logical way to apply complex facts to *Sedima's* "continuity plus relationship" test. *Morgan* v. *Bank of Waukegan*, 804 F.2d at 977.

[9] Nothing in the record, or in petitioner's brief, supports petitioner's contention that the lower courts have had difficulty applying the *Sedima* test in criminal cases. Moreover, petitioner's concern that *Sedima's* pattern analysis cannot be applied to an 18 U.S.C. § 1962(b) "takeover" claim is unfounded. *See, e.g., Papai* v. *Cremosnik*, 635 F.Supp. 1402 (N.D. Ill. 1986).

Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985); *Bank of America National Trust & Savings Association v. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986). The Eighth Circuit requires proof that the defendant has engaged in similar activity in the past or is engaged in other criminal activity elsewhere. *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986). However, these decisions merely represent diverse applications of the same principle—that alleged criminal activity must show some degree of continuity to support a RICO claim. Even if these articulations could be construed to be at variance with those of other circuit courts, issuance of certiorari would still be inappropriate at the present time since both the Fifth and Eighth Circuits are considering a re-examination of the pattern issue and the adoption of the fact-oriented standard applied generally in the circuits. *Montesano v. Seafirst Commercial Corp.,* 818 F.2d 423, 426 (5th Cir. 1987); *H.J. Inc. v. Northwestern Bell Telephone Co.,* 829 F.2d 648, 650-51 (8th Cir. 1987) (McMillan and Gibson, JJ., concurring).[10]

Regardless of how petitioner chooses to characterize the definition of pattern, the circuit courts are consistently following *Sedima's* directive that RICO's pattern requirement be analyzed in terms of continuity and relatedness. The Fourth Circuit concluded that the dispute in this case did not allege the type of continuous activity sufficient to create a pattern of racketeering activity under RICO. This view is consistent with the consensus that is continuing to emerge among the circuits in considering the application of the pattern concept to RICO claims. Accordingly, this Court should not grant certiorari to review the Fourth Circuit's appropriate analysis of the pattern concept and its conclusion that petitioner failed to allege a valid RICO claim in this case.

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[10] The articulation of the pattern concept by the circuits is a function of the judicious application of the facts of each case to the *Sedima* test and does not present the type of obvious conflict necessarily involved when two courts choose different statutes of limitation or when one court decides that a claim is subject to arbitration and the other decides that it is not.

II. Legislation Currently Pending In Congress Will Codify *Sedima's* "Continuity Plus Relationship" Test For A RICO "Pattern".

HMK asserts in its petition that Congress has no legislation pending which addresses the pattern issue. Pet. 10-11 n.5. Contrary to this assertion, on October 9, 1987, Representative John Conyers (D-Mich) introduced legislation that would clarify the "pattern" requirement of RICO. 133 Cong. Rec. 7406 (daily ed. Oct. 9, 1987 (H.R. 3240)). Bill No. 3240, which was referred the same day to the House Judiciary Committee, is currently awaiting hearings before that Committee's Subcommittee on Criminal Justice. Bill 3240 defines 'pattern' as:

> [A]t least two acts of racketeering activity or fraudulent activity, or both, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (including any period of imprisonment) after the commission of a prior act of racketeering activity or fraudulent activity, or both, that are:
>
> (A) under subsection 1962(c) of this chapter, related to the affairs of an enterprise;
>
> (B) not isolated, but they need not be part of a common scheme or plan; and
>
> (C) except under Section 1962(b) of this chapter, not so closely related to each other and connected in point of time and place that the acts constitute a single episode involving only one victim so that they do not in themselves, in light of the purpose for which they were committed, with reference to the enterprise, or otherwise, give rise to an inference of the possibility of continuity of activity.

H.R. 3240, 100th Cong., 1st Sess. (1987).[11]

Bill 3240's requirement of "multiple episodes" giving rise to "an inference of continuity of activity" will legislatively codify the continuity and relatedness factors discussed by this Court in

[11] Bill 3240 is reproduced in its entirety at Resp. App. 5a.

Sedima and will provide the "meaningful concept of pattern" which the Court found lacking at the time that *Sedima* was decided. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. at 500 (1985). Professor Blakey recently addressed the constitutionality and necessity of the courts redrafting legislation in the context of the RICO pattern requirement. According to Professor Blakey, "Congress, too, is being pressed both to retain and to circumscribe civil RICO. No indication exists that Congress is unable to fulfill its constitutional role." *Rico Revisited; An Advance Seminar on the Latest Techniques in Civil Suits*, 172-73 (1987). Accordingly, Congress should be given an opportunity to correct any perceived problems associated with the term "pattern."

Review on writ of certiorari is a matter of judicial discretion, not of right. *Sup. Ct. R.* 17.1. "Special and important" reasons are required before a writ of certiorari should be granted. *Id.* Although an alleged conflict among the circuit courts or lack of guidance for lower courts may be considered to be such reasons, these reasons decrease in importance when the enactment of legislation would alleviate the perceived problem. *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). The pendency of legislation raises the issue of the appropriateness of the expenditure of this Court's time and resources to decide an issue which the legislature is already taking steps to address. Accordingly, the Court "should not risk inconclusive and divisive disposition of a case when time may further eliminate or completely outmode the issues in dispute". *Id.* at 77. In the present case, as in *Rice*, legislation is currently pending which could eliminate any perceived problem with the term "pattern." Since any decision rendered by this Court on the pattern issue could be rendered moot by Congressional action, this case should not be accepted for review.

III. This Case Presents A Factual Setting Which Is Uncharacteristic Of Most RICO Litigation And Is Unsuitable To Review The Concept of "Pattern" Contained In *Sedima*.

Since the adoption of RICO in 1970, civil RICO litigation has largely involved commercial and securities-related disputes between private parties. Of the 270 district court RICO decisions reported prior to 1984, 77% involved fraud in commercial,

business or securities settings. *Report of the Ad Hoc Civil Rico Task Force of the ABA Section of Corporation, Banking and Business Law* 19 (1985). In contrast, less than one-third of one percent of all civil RICO litigation has involved mixed political and commercial controversies similar to the land use dispute involved in the present case.

According to statistics compiled by the Administrative Office of the United States Courts, a total of 1,709 civil RICO cases were filed in federal court from November, 1985 through June 30, 1987. Yet, the respondents have identified only six civil RICO cases, decided during approximately the same period, which allege fraudulent interference with public processes in a land use or zoning setting. *HMK Corp. v. Walsey,* 828 F.2d 1071 (4th Cir. 1987); *Town of Kearny v. Hudson Meadows Urban Renewal Corp.,* 829 F.2d 1263 (3d Cir. 1987); *Raskiewicz v. Town of New Boston,* 754 F.2d 38 (1st Cir.), *cert. denied,* 474 U.S. 845 (1985); *Naked City, Inc. v. Aregood,* 667 F.Supp. 1246 (N.D. Ind. 1987); *United States Magnet & Alloy Corp. v. Yardley Borough,* No. 86-2898 (E.D. Pa. December 11, 1986); *Verges v. Babovich,* No. 86-2382 (E.D. La. November 28, 1986). Of these six cases, three bear no factual resemblance to the present case since they involve issues unrelated to the public rezoning process or contain allegations of bribery. *Naked City, Inc. v. Aregood* (alleged improper enforcement of a zoning ordinance); *Verges v. Babovich* (alleged misuse of campaign proceeds by a local legislator with a peripheral claim of zoning impropriety); *Town of Kearny v. Hudson Meadows* (bribery of public officials in land development and flood control schemes).[12] These six cases together constitute a mere 0.35% of the RICO actions filed and decided after November 1985, hardly representative of the civil RICO litigation customarily considered by the federal courts. As discussed above, federal courts are increasingly deciding the issue of pattern in reference to the totality of facts and circumstances surrounding a dispute, and are applying the "continuity plus relationship" test of *Sedima* in a decidedly fact-oriented manner. Accordingly, any consideration of pattern in

[12] In contrast to the "typical" public corruption case, HMK has never alleged, and the record contains no facts to support, even an inference of bribery of public officials.

the context of the atypical facts presented here—a local zoning fight of importance solely to the parties in this case—would have limited value when applied by lower courts to the usual "garden variety" RICO action involving commercial or securities disputes.

In addition, further judicial review of this land use controversy conflicts with the principle that federal courts do not sit as "super zoning boards of appeals." *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982) *quoting Village of Belle Terre v. Boraas,* 416 U.S. 1, 12 (1974) (Marshall, J. dissenting). *Raskiewicz v. Town of New Boston, supra; Albery v. Reddig,* 718 F.2d 245, 249 n.7 (7th Cir. 1983). As determined by the Court of Appeals in the present case, the suit filed by HMK, despite its RICO label, is in fact nothing more than a collateral attack on legislative decisions that rezoned a developing area of the County and that have already been judicially determined to be appropriate. As such, the court, citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265 (1977), held that it was inappropriate for a federal court to delve into the County's rezoning decisions, and that doing so would "effect the wholesale transfer of that most basic of local controversies into a federal forum." *HMK Corp. v. Walsey,* 828 F.2d 1071, 1076 (4th Cir. 1987). Given the understandable reluctance of federal courts to become involved in local land use disputes and the fact that respondents' actions relating to the JCDA rezoning controversy have already been examined in depth in multiple lawsuits filed by HMK, this case is not appropriate for further judicial review.

CONCLUSION

For each of the foregoing reasons, respondents, John C. Walsey, Barry S. Blumberg, Sigma CJ Associates, Petula Associates, Ltd., Stanley R. Balderson, Jr., Richard L. Hedrick, Harold S. King and Jack S. Hodge, by counsel, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

HISTORY OF HMK LITIGATION INVOLVING JCDA

ASE	Dunning and M.K. Realty v. Board of Supervisors Boulders	M.K. Realty ROD Corp. and HMK Corp. v. Board of Supervisors, Planning Commission, Balderson, Micas and Boulders	P.H. Corp. and HMK Corp. v. Board of Supervisors and Boulders	ROD Corp. and HMK Corp. v. Board of Supervisors, Planning Commission, Balderson, Micas and Boulders	ROD Corp. v. Board of Supervisors and Boulders
OURT	State	State	State	State	
ATE LED	November 1982	August 1983	August 1983	August 1983	
LAIM	Challenged Call tract rezoning and zoning amendment in JCDA	Alleged a conspiracy to adopt General Plan 2000 for JCDA Challenged first Sigma amendment to favor Boulders at HMK's expense	Challenged amendment to zoning as a taking of Chesterfield Village Apartments in JCDA	Alleged conspiracy to approve General Plan 2000 for JCDA to favor Boulders at expense of HMK	
	Damage alleged	Damage alleged	Damage alleged	Damage alleged	
ISPOSITION	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Ct. denied October 1985	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Court denied October 1985	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Court denied October 1985	Non-suit April 1984	Continued on next page

HISTORY OF HMK LITIGATION INVOLVING JCDA

CASE	ROD Corp. v. Board of Supervisors and Boulders	HMK Corp. v. Board of Supervisors	P.H. Corp. v. Balderson, Hodder, & Prudential	P.H. Corp. v. Balderson, Hodder & Forge-O'Connell Properties	HMK CORP. v. Board of Supervisors
COURT	State	State	State	State	
DATE FILED	November 1983	November 1983	March 1985	April 1985	
CLAIM	Challenged Sigma II zoning in JCDA	Challenged denial of 1st HMK CUPD application in JCDA	Challenged conditions of Pru-Care zoning in JCDA	Challenged Fidelity Building as being in violation of zoning in JCDA	
	Damage alleged	Damage alleged	Damage alleged	Damage alleged	
DISPOSITION	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Court denied October 1985	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Court denied October 1985	Non-suit December 1985	Non-suit December 1985	Continued on next page

HISTORY OF HMK LITIGATION INVOLVING JCDA

CASE	**HMK Corp.** v. **Board of Supervisors**	**Commonwealth of Virginia** v. **HMK, et al.**	**HMK Corp.** v. **Board of Supervisors and Hedrick**	**HMK Corp.** v. **County of Chesterfield and King**	**HMK Corp.** v. **Boulders, Hedrick, Balderson, King and Hodge**
COURT	State	State	Federal	Federal	Federal
DATE FILED	April 1985	April 1985	April 1984	November 1984	January 1986
CLAIM	Challenged conditions imposed on HMK office rezoning south of Jahnke Rd. in JCDA	VDH&T sought acquisition of property for road purposes through eminent domain process; HMK claims condemnation as culmination of conspiracy	Challenged conditions in proposed contract with County to design alternate access road for HMK's property in JCDA	Alleged a conspiracy to condemn HMK property for private use of Boulders and to thwart normal zoning procedure in JCDA	RICO claim; racketeering activities involving development decisions affecting property of Boulders in JCDA
	Damage alleged	Damage alleged	Damage alleged	Damage alleged	Damage alleged
DISPOSITION	Non-suit 1985	Continuance obtained by HMK pending result of federal litigation with County County & Boulders	Contract provision declared invalid; damages awarded of $4,911	Case dismissed by Court August 1985 on grounds of ripeness and inability to claim conspiracy damages	Summary judgment granted on behalf of defendants Affirmed by Fourth Circuit Court of Appeals

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 84-0170-R

HMK CORPORATION
Plaintiff,

v.

COUNTY OF CHESTERFIELD,
Defendant.

FINAL ORDER
(Filed October 30,1986)

This matter is before the Court on the defendant's motion for summary judgment on plaintiff HMK's "phasing" damages claim. Based on Judge Warriner's March 29, 1985 opinion and the plaintiff's acknowledgment therein that if it received favorable zoning there would be no damages, the Court GRANTS defendant's motion for summary judgment. Since HMK did receive favorable zoning, even though not to the extent desired, under the law of the case as established by Judge Warriner, there can be no damages. Plaintiff HMK's claim for damages is hereby DISMISSED WITH PREJUDICE and JUDGMENT IS ENTERED for the defendant as to the "phasing" damages issue, the sole remaining claim in the case.

While the plaintiff cannot show phasing damages, HMK is the prevailing party for purposes of recovering its costs in this action, based on Judge Warriner's previous rulings. Therefore, the Clerk is DIRECTED to assess against the defendant the plaintiff's costs of action.

Let the Clerk send a copy of this order to all counsel of record.

October 30, 1986 /s/ RICHARD L. WILLIAMS
DATE UNITED STATES DISTRICT JUDGE

100TH CONGRESS
1ST SESSION

H. R. 3240

To amend chapter 96 of title 18, United States Code, relating to racketeering influenced and corrupt organizations, to create a new offense for fraudulent activity, and to restructure the civil claims procedures.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 9, 1987

MR. CONYERS (for himself and MR. EDWARDS of California) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 96 of title 18, United States Code, relating to racketeering influenced and corrupt organizations, to create a new offense for fraudulent activity, and to restructure the civil claims procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Racketeer Influenced and Corrupt Organizations Act of 1987".

SEC. 2. NEW OFFENSE FOR FRAUDULENT ACTIVITY.

(a) NEW PREDICATE OFFENSES.—Section 1961 of title 18, United States Code, is amended by striking out paragraph (1) and inserting in lieu thereof the following:

"(1) 'racketeering activity' means (A) any act involving murder, kidnapping, prostitution involving minors, gambling, arson, robbery, bribery, extortion, dealing in obscene

matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: chapter 51 (homicide), chapter 73 (obstruction of justice), and chapter 110 (sexual exploitation of children), section 32 (relating to destruction of aircraft facilities), section 81 (relating to arson), section 112 (relating to protection of foreign officials and other persons), section 115 (relating to assaults and other acts against Federal and other persons), section 201 (relating to bribery), section 215 (relating to bank bribery), section 224 (relating to sports bribery), section 373 (relating to solicitation to commit a crime of violence), sections 471, 472, and 473 (relating to counterfeiting), section 511 (relating to forgery of State and other securities), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is a felony, section 664 (relating to embezzlement from pension and welfare funds), section 666 (relating to theft or bribery in benefit programs), section 831 (relating to prohibited transactions involving nuclear material), section 844 (relating to explosive materials), section 875 (relating to interstate communications), section 876 (relating to mailing threatening communications), section 877 (relating to mailing threatening communications from foreign countries), section 878 (relating to threats), section 891-894 (relating to extortionate credit transactions), section 929 (relating to restricted ammunition), section 1084 (relating to the transmission of gambling information), section 1203 (involving hostage taking), section 1362 (relating to communications lines), section 1363 (relating to buildings), section 1364 (relating to foreign commerce), section 1365 (relating to energy facility) sections 1461-1465 (relating to obscene matter), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1952A (relating to murder-for-hire), section 1952B (relating to violent crime in aid of racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia),

section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1992 (relating to trains), section 2277 (relating to vessels), sections 2314 and 2315 (relating to interstate transportation of stolen property) except for an act indictable under the second undesignated paragraph of section 2314, sections 2318 and 2320 (relating to counterfeit materials), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic); (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); (D) any act which is indictable under the Controlled Substances Act (21 U.S.C. 951 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 801 et seq.); or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;".

(b) DEFINITION OF FRAUDULENT ACTIVITY.—Section 1961 is further amended by—

(1) redesignating paragraphs (2) through (10) as paragraphs (3) through (11), respectively; and

(2) inserting after paragraph (1) the following:

"(2) 'fraudulent activity' means (A) any act which is indictable under any of the following provisions of title 18, United States Code: section 510 (relating to fraud of the Treasury or other securities), section 1029 (relating to fraud in connection with access devices), section 1030 (relating to fraud in connection with computers), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to bonds fraud), the second undesignated paragraph of section 2314 (relating to scheme to defraud involving transportation of stolen goods and other items); (B) any act which is indictable involving fraud under title 11 (relating to bankruptcy); or (C) any act which is indictable involving fraud under the

Securities Act of 1933 (15 U.S.C. 77x), the Securities Exchange Act of 1934 (15 U.S.C. 78ff), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-3), the Trust Indenture Act of 1939 (15 U.S.C. 77yyy), the Investment Company Act of 1940 (15 U.S.C. 80a-49 and 80b-17), the Commodity Exchange Act (7 U.S.C. 13), or Truth in Lending Act (15 U.S.C. § 1644);".

(c) MODIFICATION OF PROHIBITED ACTIVITIES.—Section 1962 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) in the first sentence by striking out "or" after "racketeering activity" and inserting in lieu thereof "or a pattern of fraudulent activity, or both, or";

(B) in the second sentence by striking out "any pattern or racketeering activity or" and inserting in lieu thereof "any pattern of racketeering activity or any pattern of fraudulent activity, or both, or";

(2) in subsection (b) by striking out "or" after "racketeering activity" and inserting in lieu thereof "or a pattern of fraudulent activity, or both, or"; and

(3) in subsection (c) by striking out "or" after "racketeering activity" and inserting in lieu thereof "or a pattern of fraudulent activity, or both, or".

(d) CRIMINAL PENALTIES.—Section 1963 of title 18, United States Code, is amended in paragraph (a)(3) by inserting after "racketeering activity" the following: "or fraudulent activity, or both,".

SEC. 3. DEFINITION OF PATTERN.

Paragraph (6) of section 1961 of title 18, United States Code, as redesignated by section 2(b) of this Act, is amended to read as follows:

"(6) 'pattern' means at least two acts of racketeering activity or fraudulent activity, or both, one of which occurred

after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity or fraudulent activity, or both, that are—

"(A) under subsection 1962(c) of this chapter, related to the affairs of an enterprise;

"(B) not isolated, but they need not be part of a common scheme or plan; and

"(C) except under section 1962(b) of this chapter, not so closely related to each other and connected in point of time and place that the acts constitute a single episode involving only one victim so that they do not in themselves, in light of the purpose for which they were committed, with reference to the enterprise, or otherwise, give rise to an inference of the possibility of continuity of activity;".

SEC. 4. CRIMINAL AND CIVIL SANCTIONS.

(a) CRIMINAL SANCTIONS.—Section 1963 of title 18, United States Code, is amended by striking out "both," and inserting in lieu thereof "both; if death results, any term of years or for life;".

(b) CIVIL REMEDIES.—Section 1964 of title 18, United States Code, is amended to read as follows:

"§ 1964. Civil remedies

"(a) In any civil action or proceeding instituted under this section, the district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter, shown by a preponderance of evidence, by rendering an appropriate judgment or decree, including—

"(1) ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

"(2) imposing reasonable restrictions on the future activities or investments of any person, including prohibiting

any person from engaging in the same type of endeavor as the enterprise engaged in or the activities of which affect interstate or foreign commerce;

"(3) ordering dissolution or reorganization of any enterprise, making the due provision for the rights of innocent persons; or

"(4) taking such other action as may be just.

"(b)(1) The Attorney General may institute a proceeding under subsection (a) of this section.

"(2) Pending final determination of a proceeding instituted by the Attorney General under subsection (a) of this section, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as might be just.

"(c)(1) Any person may institute a proceeding under subsection (a) of this section.

"(2) In any proceeding brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage, including the possibility that any judgment for money damages might be difficult to execute, in other cases, but no showing of special or irreparable injury shall have to be made.

"(3) Upon the execution, in the discretion of the court, of a proper bond against damages for an injunction improvidently granted, a temporary restraining order and a preliminary injunction may be issued in any proceeding under subsection (a) of this section before a final determination of it upon its merits. Such undertaking shall not be required when the applicant is a State or territory of the United States.

"(4) If the person who brings a proceeding under subsection (a) of this section substantially prevails, his recovery shall include the costs of the action, including a reasonable attorney's fee in the trial and appellate courts.

"(d) Whenever the United States is, directly or indirectly, injured in its business or property by reason of any violation of

section 1962 of this chapter, the Attorney General may bring a civil action in an appropriate United States district court and shall recover threefold the actual damages, shown by a preponderance of evidence, sustained by it, and if the United States substantially prevails, the costs of the action, including the costs of investigations and litigation.

"(e)(1) Any person who is, directly or indirectly, injured—

"(A) in his person by a crime of violence, or

"(B) in his business or property by reason of any violation of section 1962 of this chapter, may bring a civil action in an appropriate United States district court and shall recover threefold the actual damages, shown by a preponderance of evidence, sustained by him, and if the person who brings the action under this subsection substantially prevails, the costs of the action, including a reasonable attorney's fee in the trial and appellate courts.

"(2) Damages recovered under this subsection shall not be limited to competitive or distinct injury.

"(f) If the court determines that the filing of any pleading, motion, or paper under subsection (c) or (e) of this section was frivolous or that any action or proceeding was brought or continued under subsection (c) or (e) of this section in bad faith, vexatiously, wantonly, or for an improper or oppressive reason, it shall award treble the actual costs of the action or proceeding including a reasonable attorney's fee in the trial and appellate courts, unless the court finds that special circumstances, including the relative economic position of the parties, make such an award unjust.

"(g) Upon the filing of a civil action or proceeding under subsection (c) or (e) of this section, the person filing the action or proceeding shall immediately notify the Attorney General in such manner as the Attorney General shall direct by regulations. The United States may, upon timely application, intervene in any civil action or proceeding brought under subsection (c) or (e) of this section, if the proceeding is of general public importance. In such action or proceeding, the United States shall be

entitled to the same relief as if it had instituted the action or proceeding.

"(h)(1) Notwithstanding any other provision of law providing a shorter period of limitation, any civil action or proceeding under subsection (c) or (e) of this section, shall be barred unless it is commenced within five years after the unlawful conduct terminated or the cause of action otherwise accrued, whichever is later.

"(2) Whenever any civil action or criminal action or proceeding is brought or intervened in by the United States to prevent, restrain, sanction, or punish any violation of section 1962 of this chapter, the running of the period of limitations provided in this subsection with respect to any cause of action arising under subsection (c) or (e) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years after the pendency of such action.

"(i)(1) Notwithstanding any other provision of law, any civil action or proceeding brought under subsection (c) or (e) of this section, the underlying elements of which constitute fraudulent activity, by any person, other than any attorney general under subsection (1) of this section or a State or unit of local government, shall be subject to the procedures of chapter 1 of title 9 (relating to arbitration).

"(2) Any claim resolved under the procedures of chapter 1 of title 9 (relating to arbitration) under this subsection shall preclude the parties to such claim as to issues and claims decided in such arbitration if—

"(A) the party seeking to use issue or claim preclusion could not have jointed the previous proceedings;

"(B) the party against whom issue or claim preclusion would apply had incentive to fully litigate the issue in the prior proceeding;

"(C) there have been no inconsistent rulings on the issue in prior actions or proceedings; and

"(D) there are no new procedural opportunities available to the precluded party in the second action or proceeding or, if there are, they are not likely to cause a result different from that of the first action or proceeding.

"(j)(1) No action or proceeding may be brought under subsection (c) or (e) of this section by a person, if the elements of the pattern of fraudulent activity involve primarily—

"(A) domestic relations;

"(B) products liability;

"(C) decedents estates; or

"(D) a landlord-tenant dispute.

"(2) No action or proceeding may be brought under subsection (c) or (e) of this section by a person in connection with and during a labor dispute.

"(3) For the purposes of this subsection—

"(A) 'domestic relations' means divorce, separation, custody, support, or adoption;

"(B) 'products liability' means the liability of manufacturers or sellers to compensate buyers, users, or others for any damages suffered because of manufacturing or packaging defects in goods sold;

"(C) 'labor disputes' means any controversy concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange the terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee;

"(D) 'decedents estates' means will, bank account trusts, testamentary trusts, revocable trusts that become irrevocable upon death of grantor, or intestate succession; and

"(E) 'landlord-tenant disputes' means any dispute concerning the terms of fulfillment of a contract arising out

of the relation where one person occupies the premises of another with his permission in subordination to the other's interest in the premises.

"(k)(1) Notwithstanding any other provision of law, any pleading, motion, or other paper filed by a person in connection with an action or proceeding under subsection (c) or (e) of this section shall be verified. Where the person is represented by an attorney, the pleading, motion, or other paper shall be signed by at least one attorney of record in his individual name, whose address shall be stated. Where such pleading, motion, or other paper includes an averment of fraud, coercion, agency, respondent superior, accomplice, or conspiratorial liability, it shall state, insofar as practicable, the circumstances with particularity.

"(2) The verification by a person and the signature by an attorney required by this subsection shall constitute a certification by the person or attorney that he has carefully read the pleading, motion, or other paper and, based on a reasonable inquiry, believes that—

"(A) it is well grounded in fact;

"(B) it is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law; and

"(C) it is not made for any bad faith, vexatious, wanton, improper or oppressive reason, including to harass, to cause unnecessary delay, to impose a needless increase in the cost of litigation, or to force an unjust settlement through the serious character of the averment.

"(3) If a pleading, motion, or other paper is verified or signed in violation of the certification provisions of this subsection, the court, upon motion or upon its own initiative, shall, after a hearing and appropriate findings of fact, impose upon the person who verified it or the attorney who signed it, or both, a fit and proper sanction, including treble the actual costs of the proceeding or action under subsection (f) of this section.

"(l)(1) Notwithstanding the provisions of subparagraphs (A), (B), (C), and (D) of paragraph (1) of subsection (j) of

this section, any attorney general of a State may bring an action or proceeding under subsection (c) or (e) of this section in the name of the State, as parens patriae, on behalf of individuals residing in the State, in an appropriate United States district court. The court shall exclude from the amount of monetary relief awarded in the action or proceeding any amount of monetary relief—

"(A) which duplicates amounts which have been awarded for the same claim; or

"(B) which is properly allocable to natural persons who have excluded their claims pursuant to this subsection and any business entity.

"(2)(A) In any action or proceeding brought under this subsection, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice of it to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person, the court may direct further notice to such person according to the circumstances of the case.

"(B) Any person on whose behalf an action or proceeding is brought under this subsection may elect to exclude from adjudication the portion of the State claim for monetary or other relief attributable to him by filing notice of such time as specified in the notice given under this subsection.

"(C) Any final judgment or decree in any action or proceeding under this subsection shall preclude any issue or claim under subsection (c) or (e) of this section by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given under this subsection.

"(3) Any action or proceeding under this subsection shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

"(4) In any action or proceeding under this subsection—

"(A) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

"(B) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, frivolously, vexatiously, wantonly, or for an improper or oppressive reason.

"(5) For purposes of this subsection, the term 'state attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under subsection (c) or (e) of this section and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—

"(A) a contingency fee based on a percentage of the monetary relief awarded under this subsection; and

"(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under this subsection.

"(m) A final judgment or decree rendered in favor of the United States in any civil action or criminal action or proceeding in favor of the United States or any plaintiff or a defendant in any civil action or proceeding shall preclude the plaintiff or defendant in any subsequent civil action or proceeding as to all issues or claims respecting which the judgment or decree would preclude an issue or claim between the parties to it.

"(n)(1) The court may award under this section, upon the motion made after verdict, simple interest on actual damages for the period beginning on the date of service of the pleading setting forth a cause of action under this section and ending on the date of verdict, or for any shorter period, if the court finds that the award of interest for the period is just.

"(2) In determining whether an award of interest under this section for any period is just the court shall consider—

"(A) whether the opposing party, or either party's representative, filed pleadings, made motions, or filed other papers so lacking in merit as to show that such party or representative acted in bad faith, vexatiously, wantonly, or for an improper or oppressive reason;

"(B) whether, in the course of the proceeding or action involved, the opposing party, or either party's representative, violated any applicable rule, statute or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

"(C) whether the opposing party, or either party's representative engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost of the litigation; and

"(D) whether the award of such interest is necessary to compensate the opposing party for the injury sustained by him.

"(o)(1) An action or proceeding under this section shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

"(2) An action or proceeding under this section shall survive and be enforceable against a receiver in bankruptcy, but only to the extent of actual damages or other relief."

(c) VENUE AND PROCESS.—Section 1965 of title 18, United States Code, is amended—

(1) in subsection (b), by striking out "residing in any other district";

(2) in subsection (b), by striking out "in any judicial district of the United States by the marshall thereof." and inserting in lieu thereof "anywhere the party may be found";

(3) in subsection (c), by striking out "in any other judicial district" and inserting in lieu thereof "anywhere the witness is found";

(4) in subsection (c), by striking out "in another district"; and

(5) in subsection (d), by striking out "in any judicial district in which" and inserting in lieu thereof "where".

SEC. 5. COSTS OF PROSECUTION AND INVESTIGATION.

Section 1918 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Upon conviction in a court of the United States for an offense in chapter 96 of title 18, the court may order the defendant pay the costs of investigation and prosecution. Amounts collected under the preceding sentence shall be covered into miscellaneous receipts of the Treasury.

"(2) As used in this subsection, the term 'costs of investigation' includes—

"(A) attorney, investigator, and auditor salaries and expenses;

"(B) special contract costs and special purchases;

"(C) travel costs and witness fees; and

"(D) grand jury fees and other related costs of investigation."

SEC. 6. SENSE OF CONGRESS.

It is the sense of the Congress that the National Association of Attorneys General form a State RICO committee that will promulgate advisory guidelines on the use of section 1964 of title 18, United States Code, by State and local units of government that will seek to assure, among other relevant factors, that it—

(1) is used—

(A) with restraint;

(B) selectively;

(C) uniformly;

(D) only where necessary adequately to reflect or reach the nature and extent of the unlawful activity involved; and

(E) with due regard for limited Federal judicial resources; and

(2) is not used—

(A) routinely; or

(B) to create a bargain tool where its use would otherwise be inappropriate.

SEC. 7. CONSTRUCTION DIRECTIVES.

Chapter 96 of title 19, United States Code, shall not be construed—

(1) to prohibit a person from constituting an enterprise, or a part thereof, and a defendant in the same count of an indictment or a complaint;

(2) to require in a criminal or civil proceeding or action the showing of economically motivated conduct or a mercenary motive;

(3) to confer jurisdiction to hear a criminal or civil proceeding or action under its provisions on a judicial or other forum of a State or local unit of government;

(4) to permit the showing of an enterprise by no more than a showing of a pattern of racketeering or fraudulent activity, or both;

(5) to require a showing that each person named as a defendant in a criminal or civil proceeding or action commit, or agree to commit, personally the minimum number of acts required to constitute a pattern; or

(6) to permit a showing of criminal responsibility or civil liability without a showing of a state of mind other than that required for the offenses included in the pattern of racketeering or fraudulent activity, or both.

SEC. 8. CONFORMING AMENDMENTS.

(a) The analysis of chapter 96 of title 18, United States Code, is amended by striking out the item for section 1962 and inserting in lieu thereof the following:

(b) Section 1962(d) of title 18, United States Code, is amended by striking out "subsections" and inserting in lieu thereof "subsection".